A

LAU CHEE KAI

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
HASAN LAH JCA
ABDUL MALIK ISHAK JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: B-05-302-2009]

C

20 SEPTEMBER 2011

CRIMINAL PROCEDURE: *Charge - Defective charge - Appeal against conviction and sentence - Prima facie case under s. 3 Kidnapping Act 1961 not proved but one under s. 5 proved - Trial judge amended*

D

charge to state accused 'received' ransom money - Accused convicted after defence called on amended charge - Evidence showed accused had possession of ransom money - Offence of 'receiving' not proved - Defence called on offence not proven - Date, time, place and offence stated in amended charge wrong - Whether accused misled and prejudiced -

E

Whether failure of justice occasioned - Whether defence that money was obtained from money changer inherently probable and believable - Criminal Procedure Code, ss. 152(1), 153(1), 156, 182A & 422

EVIDENCE: *Documentary evidence - Computer printout - Whether*

F

admissible - Oral evidence by only one of two witnesses who entered contents of printout into computer - Witness did not say if printout produced by computer 'in the course of its ordinary use' - Certificate under s. 90A(2) Evidence Act 1950 not tendered - Whether proof that printout was produced by a computer sufficient to invoke presumption

G

under s. 90A(6) to admit document

The appellant was originally charged, together with others still at large, under s. 3 of the Kidnapping Act 1961 ('the Act') for kidnapping a 7-year-old boy with the common intention of acquiring RM6m in ransom money. At the end of the

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prosecution's case, the High Court ruled that a *prima facie* case under s. 3 of the Act had not been proved but that one under s. 5 of the Act had been proved. The trial judge amended the charge to read that the appellant had received Singapore $7,750 as ransom money contrary to s. 5 of the Act. The appellant's

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defence was called on the amended charge. At the end of the

trial, the appellant was convicted of the amended charge and sentenced to eight years jail and two strokes of whipping. Hence, the appellant appealed to this court against the conviction and sentence.

The brief facts of the case was that the victim was kidnapped by four people wearing masks when he was in a car at the parking lot of a commercial centre on the night of 1 March 2008. The boy was blindfolded and taken to a house and released six days later after his father paid the ransom money which was a mix of Ringgit, and Singapore and Brunei dollars. The appellant was arrested by the police on 9 May 2008 on suspicion of being involved in the kidnapping. From the master bedroom of his house, the police seized money in various currencies which included Singapore $10,000. Out of that amount, the police determined that S$7,750 comprised of the ransom money as the serial numbers on the notes tallied with the serial numbers on some of the ransom money.

In his defence at the trial, the appellant denied that the S$10,000 was ransom money. He said that amount was obtained after his wife had converted Ringgit into Singapore currency at a money changer. The money was to pay the expenses of sending the appellant's father to Singapore for medical treatment. The appellant's wife corroborated the appellant's evidence in this regard at the trial. The trial judge, however, rejected this piece of evidence as the serial numbers on the currency tallied with the serial numbers on the ransom money.

Among the grounds of appeal was, *inter alia*, that (i) the amended charge as framed by the trial judge was defective, vague and confusing as the date, time, place and the specific offence stated in the amended charge was wrong and (ii) the defence had raised a reasonable doubt that the money found in the appellant's master bedroom was not part of the ransom money.

Held (allowing the appeal; setting aside the conviction and sentence)
Per Hasan Lah JCA delivering the judgment of the court:

(1) It was not proved that the appellant was involved in the kidnapping nor that on the same date (1 March 2008) he had received S$7,750 of the ransom money. What the prosecution

had proved was that on 9 May 2008, the appellant had in his possession S$7,750 of ransom money. The appellant should have been called to enter his defence on the offence of having in his possession S$7,750 of ransom money and not the offence of receiving the ransom money. (paras 50 & 51)

(2) The date, time, place and the specific offence stated in the amended charge were clearly wrong and the charge as framed did not comply with ss. 152(1) and 153(1) of the Criminal Procedure Code ('CPC'). The amended charge was defective as it failed to state the material particulars. The defects were not curable under s. 422 of the CPC. (paras 53, 55 & 58)

(3) The appellant was ordered to enter his defence on an offence that had not been proved by the prosecution at the close of the prosecution's case. He was prejudiced and misled by the several errors in the amended charge which had occasioned a failure of justice. (para 58)

(4) The appellant's defence that the S$7,750 was not ransom money as it had been obtained from the money changer, was not inherently improbable and unbelievable. The trial judge had erred in rejecting the defence as the appellant had raised a reasonable doubt in the prosecution's case. (para 65)

(5) From the trial judge's judgment, it was not clear whether the appellant had been convicted for the offence of receiving the ransom money or for the offence of having it in his possession, whether the presumption under s. 5(2) of the Act had been invoked against the appellant or whether he had adequately evaluated the evidence adduced by the defence. (paras 62 & 63)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah pada asalnya dituduh, bersama-sama dengan orang lain yang masih bebas, di bawah s. 3 Akta Penculikan 1961 ('Akta') kerana menculik seorang budak lelaki berumur tujuh tahun dengan niat bersama untuk memperolehi RM6 juta sebagai wang tebusan. Pada akhir kes pendakwaan, Mahkamah Tinggi telah memutuskan bahawa satu kes *prima facie* tidak terbukti di bawah s. 3 Akta tetapi telah dibuktikan di bawah s. 5 Akta. Hakim perbicaraan telah meminda pertuduhan untuk dibaca sebagai

perayu telah menerima wang Singapura $7,750 sebagai wang tebusan bertentangan dengan s. 5 Akta. Pembelaan perayu telah dipanggil berdasarkan pertuduhan terpinda. Pada akhir perbicaraan, perayu telah disabit terhadap pertuduhan terpinda tersebut dan dijatuhkan hukuman lapan tahun penjara dan dua sebatan. Oleh itu, perayu merayu ke atas sabitan dan hukuman.

Fakta ringkas kes adalah bahawa mangsa telah diculik oleh empat orang bertopeng apabila beliau berada di dalam kereta yang terletak di tempat letak kereta sebuah pusat komersial pada malam 1 Mac 2008. Budak tersebut telah diikat matanya dan dibawa ke sebuah rumah dan dilepaskan enam hari selepas bapanya membayar wang tebusan yang terdiri daripada campuran Ringgit dan dolar Singapura dan Brunei. Perayu telah ditangkap oleh polis pada 9 Mei 2008 kerana disyaki terlibat dalam penculikan tersebut. Dari bilik utama rumah perayu, pihak polis telah merampas pelbagai jenis mata wang termasuk wang Singapura $10,000. Dari amaun tersebut, pihak polis telah menentukan bahawa S$7,750 terdiri daripada wang tebusan memandangkan nombor siri pada nota-nota itu adalah selari dengan nombor siri pada wang tebusan.

Dalam pembelaannya semasa perbicaraan, perayu menafikan bahawa S$10,000 adalah wang tebusan. Dia menyatakan bahawa amaun tersebut telah diperolehi selepas isterinya menukar wang Ringgit kepada mata wang Singapura dari pengurup wang. Wang tersebut adalah bertujuan untuk membiayai perbelanjaan menghantar ayah perayu ke Singapura untuk rawatan perubatan. Isteri perayu telah menyokong keterangan perayu dalam perkara ini semasa perbicaraan. Walau bagaimanapun, hakim perbicaraan telah menolak cebisan keterangan ini memandangkan nombor siri pada mata wang adalah selari dengan nombor siri pada wang tebusan.

Di antara alasan-alasan rayuan adalah, di antara lain, bahawa (i) pertuduhan terpinda seperti yang dirangka oleh hakim perbicaraan adalah cacat, tidak jelas dan mengelirukan kerana tarikh, masa, tempat dan pertuduhan spesifik yang ternyata dalam pertuduhan terpinda adalah salah dan (ii) pihak pembelaan telah membangkitkan keraguan munasabah bahawa wang yang dijumpai di bilik utama perayu bukanlah sebahagian daripada wang tebusan.

Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman)
Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:

(1) Tidak terbukti bahawa perayu telah terlibat dalam penculikan atau pun pada hari yang sama iaitu pada 1 Mac 2008, dia telah menerima S$7,750 sebagai wang tebusan. Apa yang telah dibuktikan oleh pendakwaan adalah bahawa pada 9 Mei 2008, perayu telah memiliki dalam simpanannya wang tebusan sebanyak S$7,750. Perayu sepatutnya dipanggil untuk memasuki pembelaannya bagi kesalahan memiliki dalam simpanannya wang tebusan S$7,750 dan bukannya untuk kesalahan menerima wang tebusan.

(2) Tarikh, tempat, masa dan kesalahan spesifik yang dinyatakan dalam pertuduhan terpinda adalah dengan jelasnya salah dan pertuduhan terpinda tersebut tidak mematuhi ss. 152(1) dan 153(1) Kanun Tatacara Jenayah ('KTJ'). Pertuduhan terpinda adalah cacat di mana ianya telah gagal menyatakan butir-butir material. Kecacatan tersebut tidak boleh dipulih di bawah s. 422 KTJ.

(3) Perayu telah diarah untuk memasuki pembelaannya terhadap kesalahan yang tidak dibuktikan oleh pihak pendakwaan pada penutup kes pendakwaan. Perayu telah diprejudis dan disalah arah oleh beberapa kesilapan dalam pertuduhan terpinda yang telah menyebabkan kegagalan keadilan.

(4) Pembelaan perayu bahawa S$7,750 bukannya wang tebusan kerana ianya telah diperolehi daripada pengurup wang bukannya tidak mungkin dan tidak boleh dipercayai. Hakim perbicaraan telah terkhilaf dalam menolak pembelaan tersebut memandangkan perayu telah membangkitkan keraguan munasabah dalam kes pendakwaan.

(5) Daripada penghakiman hakim perbicaraan, ianya tidak jelas sama ada perayu telah disabit bagi kesalahan menerima wang tebusan atau bagi kesalahan memiliki dalam simpanannya, sama ada anggapan di bawah s. 5(2) Akta telah digunakan terhadap perayu atau pun sama ada beliau telah menilai dengan secukupnya keterangan yang telah dikemukakan oleh pihak pembelaan.

Case(s) referred to:
Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA ***(refd)***
Hanafi Mat Hassan v. PP [2006] 3 CLJ 269 CA ***(refd)***
Jagar Singh v. PP [1936] 1 LNS 25 HC ***(refd)***
Law Kiat Lang v. PP [1965] 1 LNS 81 FC ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
PP v. Lee Pak [1937] 1 LNS 48 HC ***(refd)***
PP v. Raymond Chia Kim Chwee & Anor & Another Case [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 FC ***(refd)***
Subramaniam v. PP [1956] 1 LNS 115 PC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 152(1), 153(1), 156, 182A, 422
Evidence Act 1950, ss. 90A(2), (6), 114(g)
Kidnapping Act 1961, s. 5
Penal Code, s. 34

For the appellant - Afifuddin Ahmad Hafifi; M/s Salehuddin Saidin & Assocs
For the respondent - Andi Razalijaya A Dadi DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-103-2008]

Reported by Ashok Kumar

JUDGMENT

Hasan Lah JCA:

[1] The appellant was prosecuted in the High Court at Shah Alam upon the following charge:

> Bahawa kamu bersama-sama beberapa orang lain yang masih bebas pada 1 Mac 2008 jam lebih kurang 9.30 malam bertempat di tempat letak kereta NZX Commercial Centre, Jalan PJU 1A/41B Kelana Jaya dalam Daerah Petaling Jaya, dalam Negeri Selangor Darul Ehsan, di dalam mencapai niat bersama kamu, bagi mendapatkan wang tebusan sebanyak RM6,000,000 telah menahan Seow Wei Sheng (surat beranak no. AV 62459) dengan cara melarikan secara salah Seow Wei Sheng, oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 3 Akta Penculikan 1961 (Akta 365) dibaca bersama Seksyen 34 Kanun Keseksaan.

[2] At the conclusion of the case for the prosecution the learned trial judge ruled that the prosecution failed to prove a *prima facie* case against the appellant on the offence charged. The learned trial judge however found a *prima facie* case under s. 5 of the Kidnapping Act 1961 ("the Act") had been proved against the appellant. The appellant was then called to enter his defence on the amended charge, which is as follows:

> Bahawa kamu bersama-sama beberapa orang lagi yang masih bebas pada 1 Mac 2008, jam lebih kurang 9.30 malam bertempat di tempat letak kereta NZX Commercial Center, Jalan PJU 1A/41B, Kelana Jaya, di dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan, di dalam mencapai niat bersama kerana bagi mendapatkan wang tebusan sebanyak RM6,000,000 telah menahan Seow Wei Sheng (No. Surat Beranak: AV 62459) dan kamu telah menerima wang tersebut sebanyak SD7750/- dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 5, Akta Colek 1961 (semakan 1989) dan boleh dihukum di bawah seksyen yang sama dan dibaca bersama dengan seksyen 34 Kanun Keseksaan.

[3] At the conclusion of the trial the appellant was convicted under s. 5 of the Act and sentenced to eight years imprisonment with effect from the date of his arrest and two strokes of whipping. Hence this appeal.

[4] The case for the prosecution is as follows. The victim, Seow Wei Sheng (PW7), was seven years old at the time of the incident. When he gave evidence in court he was nine years old. On 1 March 2008 at about 9pm while he was in a motor car bearing registration number WEY 9 with his mother's maid, PW6 and his cousin, PW5 at the parking lot of NZX Commercial Center, Jalan PJU 1A/41B Kelana Jaya, he was kidnapped by four persons. The four kidnappers wore masks. PW7, who was blindfolded, was taken to a house.

[5] On 2 March 2008, Dato' Seow Yin Loy (PW8), PW7's father, received a call from a caller who said "Kamu telah tahu apa maksud saya buat panggilan ini". The caller demanded RM50 million as ransom money for the release of PW7. PW8 told the caller that he could only afford to pay RM1 million.

[6] On 3 March 2008 the caller called PW8 again and PW8 told the caller that he managed to get RM2 million. The caller also called PW8 on 4 and 5 March 2008 to find out how much money PW8 had collected.

[7] Finally, by 6 March 2008 PW8 managed to collect RM6 million and the caller agreed to accept the amount as a ransom money. The caller then gave instructions to PW8 how to deliver the ransom money to the kidnappers. PW8 asked his son, Seow Wei Khong (PW9) and his son-in-law Wang Kok Chong to deliver the money by following the instructions given by the caller.

[8] PW9 testified that the kidnappers had agreed to accept about RM5 million of ransom money for the release of PW7. The kidnappers instructed part of the ransom money to be paid in Singapore Dollars. After PW8 managed to collect about RM5 million in Ringgit, Singapore and Brunei Dollars the police asked them to make photostat copies of the notes and PW9 photostated about RM5 million of the notes.

[9] On 6 March 2008 PW9 and Wang Kok Chong went to deliver the money. PW9 was asked to drop the two bags containing the money along the Kesas Highway. After dropping the two bags as instructed PW9 and Wang Kok Khong went home.

[10] In the early morning of 7 March 2008, PW9 received a call from the kidnappers. They told him PW7 had been released near a Chinese temple in Puchong. PW9 and PW8 went to the place and they found PW7 there.

[11] PW9 testified that the photostated copies of the notes were bound into five volumes which were produced by the prosecution as exh. P12 (1-5). Under cross-examination PW9 said the Ringgit were in RM50 and RM100 denominations while the Singapore Dollars were in $50, $100 and $1,000 denominations. He was unsure of the Brunei Dollar. He did not record the serial numbers of the notes. He also did not make any markings on the photostated copies of the notes.

[12] On 9 May 2008 at about 1.30pm Chief Inspector Nasir bin Ismail (PW12) went to Petaling Jaya Old Town after he received information that a suspect involved in the kidnapping of PW7 was seen there. The suspect, who was later identified in court as the appellant, was arrested while he was coming out from a bank. According to PW12 while being arrested the appellant tried to escape.

[13] From the master bedroom of the appellant's house at No. 21, Jalan SM3, Taman Sri Manja, Jalan Kelang Lama, Petaling Jaya ("the said house") PW12 seized money in various currencies – the Ringgit, Singapore Dollar, Hong Kong Dollar and Thailand Baht. The Singapore currency seized from the appellant's master bedroom are 100 $50 notes and five $1000 notes totalling S$10,000. The appellant and the money seized from the appellant were handed over to the investigating officer, ASP Haslah binti Bachok (PW16).

[14] PW16 testified that on 7 March 2008 at about 12.30pm she received P12 (1-5). She then keyed in the serial numbers of the notes into the computer. A printed copy of the notes' serial numbers was produced and tendered by the prosecution as exh. P71.

[15] The appellant was handed over to PW16 by PW12 on 13 May 2008 and the money and other items seized from the appellant by PW12 were given to her by PW12 on 14 May 2008. According to PW16 the serial numbers of 60 of the 105 Singapore Dollar notes seized from the appellant's master bedroom tallied with the serial numbers of some of the ransom money. The amount involved was S$7,750.

[16] Under cross-examination PW16 said only 3/4 of the ransom money was photostated. From her investigation she found $2.3 million in Singapore and Brunei Dollars and RM650,000 were paid as ransom money.

[17] In his defence the appellant, who elected to give evidence on oath, testified that he stayed at the said house with his wife and three children, his father, his sister, his brother and his brother's wife. He was arrested by the police on 9 May 2008. The police brought him to the said house where they seized money from his master bedroom, including the S$10,000. His explanation was that the money, which was kept by him, his brother and sister was changed into the Singapore Dollar for the purpose of paying the expenses for sending his father to Singapore for medical treatment there.

[18] His wife, Lai May Loon (DW2), was the one who changed the money into the Singapore currency with a money changer at the Sungai Wang Plaza, Kuala Lumpur in April 2008. He denied that the money was part of the ransom money.

[19] Under cross-examination he denied that he demanded RM50 million from PW8 as ransom money. He also denied that he had taken S$200,000 from the ransom money. He also denied that he was involved in the kidnapping of PW7.

[20] DW2 testified that she changed the money into the Singapore currency in April 2008 with a money changer at Sungai Wang Plaza and kept the money in the cupboard inside her master bedroom without informing the appellant. She confirmed the appellant's testimony that the money was to be used for the treatment of the appellant's father in Singapore who was suffering from lungs' illness. They intended to go to Singapore in May 2008.

[21] At the conclusion of the trial the learned trial judge held that the defence had failed to raise a reasonable doubt in the prosecution case on the amended charge.

[22] Learned counsel for the appellant raised a number of grounds of appeal in his submission. These grounds of appeal can be summarized as follows:

(a) The prosecution had not proved that the Singapore currencies seized from the appellant's house were part of the ransom money;

(b) The learned trial judge had admitted and took into consideration the prejudicial evidence;

(c) The non-calling of Chief Inspector Lim;

(d) The learned trial judge failed to explain to the appellant at the end of the prosecution case what offence had been proved against him and that the amended charge was defective; and

(e) The defence had raised doubt in the prosecution case.

Whether The Singapore Currencies Seized From The Appellant's House Were Part Of The Ransom Money

[23] Learned counsel for the appellant submitted that the appellant was arrested about two months after the incident of kidnapping of PW7. The money was seized from the appellant's house by PW12 on 9 May 2008 but it was only handed over to

A PW16 on 14 May 2008. There was therefore a gap of five days and PW12 did not explain what happened to the money within that period before he handed it over to PW16.

[24] Learned counsel for the appellant further submitted that
B PW16 did not compare and check the seized money with exh. P12 (1-5). What she did was to compare and check the seized money with exh. P71 to find out whether the seized money was part of the ransom money. It was contended by the defence that exh. P71 was not admissible as the provision of s. 90A of the
C Evidence Act 1950 had not been complied with. Firstly, the serial numbers of the money found in exh. P12 (1-5) were keyed in into the computer by PW16 and one Inspector Salwani. They took about two months to do that. Only PW16 gave evidence. Inspector Salwani was not called to give evidence. Secondly, the
D prosecution had not tendered a certificate under s. 90A (2) of the Evidence Act 1950. The prosecution had not proved that the computer used by PW16 and Inspector Salwani was in the course of its ordinary use.

E **[25]** Section 90A of the Evidence Act 1950 provides:

> (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course
> F of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.
>
> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate
> G signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.
>
> H (3)(a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.
>
> (b) A certificate given under subsection (2) shall be admissible
> I in evidence as *prima facie* proof of all matters stated in it without proof of signature of the person who gave the certificate.

(4) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced.

(5) A document shall be deemed to have been produced by a computer whether it was produced by it directly by means of any appropriate equipment, and whether or not there was any direct or indirect human intervention.

(6) A document produced by a computer, or a statement contained in such documents, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

(7) Notwithstanding anything contained in this section, a document produced by a computer, or a statement contained in such documents, shall not be admissible in evidence in any criminal proceeding, where it is given in evidence by or on behalf of the person who is charged with an offence in such proceeding the person so charged with the offence being a person who was:

(a) responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used; or

(b) in any manner or to any extent involved, directly or indirectly, in the production of the document by the computer.

[26] The provision of s. 90A of the Evidence Act 1950 was considered by this court in the case of *Gnanasegaran Pararajasingam v. Public Prosecutor* [1997] 4 CLJ 6 where Shaik Daud JCA, at pp 17-18, had this to say:

> On reading through s. 90A of the Act, we are unable to agree with the construction placed by learned counsel. First and foremost, s. 90A which has seven subsections should not be read disjointedly. They should be read together as they form one whole provision for the admissibility of documents produced by

A computers. As stated earlier, s. 90A was added to the Act in 1993 in order to provide for the admission of computer-produced documents and statements as in this case. On our reading of this section, we find that under sub-s. (1), the law allows the production of such computer-generated documents or statements if there is evidence, firstly, that they were produced by a computer. Secondly, it is necessary also to prove that the computer is in the course of its ordinary use. On our view, there are two ways of proving this. One way is that it 'may' be proved by the production of the certificate as required by sub-s. (2). Thus, sub-s. (2) is permissive and not mandatory. This can also be seen in sub-s. (4) which begins with the words 'Where a certificate is given under subsection (2)'. These words show that a certificate is not required to be produced in every case. It is our view that once the prosecution adduces evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to also produce a certificate under sub-s. (2) as sub-s. (6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use. It is also our view that the prosecution can tender the computer printout through the investigating officer without calling any bank officer. Therefore, when they adopt this way of proof, then it would be incumbent upon them to establish that the document is produced by a computer in the course of its ordinary use by producing the certificate under sub-s. (2). The reason seems to me to be obvious as the investigating officer will be in no position to say that the printout is produced by a computer in the course of its ordinary use, as he is not an officer of the bank.

In the present case, Zainal – the person in charge of the operations of current accounts – testified that the statement of accounts was a computer printout. Therefore, in our view, the first part of sub-s. (1) has been proved, ie that the document is a computer printout. It would be superfluous for him to issue a certificate under sub-s. (2) when firsthand evidence that 'the document so were produced by a computer' was given by Zainal. It would be superfluous to have a provision such as in sub-s. (6) if in every case a certificate must be produced. It follows, therefore, that such a certificate need only be tendered if an officer like Zainal is not called to testify that the statement is produced by a computer. Then the certificate becomes relevant to establish that the document is produced by a computer in the course of its ordinary use. It is our view that when such an officer is not called, the court cannot rely on the deeming provision of sub-s. (6). Once the court accepts the evidence of Zainal – and in this

> case we cannot see any reason whatsoever for the court not to as there was no challenge by cross-examination – the prosecution has succeeded in proving what s. 90A(1) requires them to prove: that such document was produced by the computer and in view of the deeming provision of sub-s. (6), the second part is also proved.

[27] In *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800 Zulkefli Makinudin FCJ, after referring to the decisions of this court in *Gnanasegaran Parajasingam* and *Hanafi Mat Hassan v. PP* [2006] 3 CLJ 269, had this to say:

> [33] I agree with the views expressed in the above passages from *Hanafi Mat Hassan v. Public Prosecutor* in the analysis of s. 90A. In substance therefore the fact that a document was produced by a computer in the course of its ordinary use may be proved by the tendering in evidence of a certificate under s. 90A (2) or by way of oral evidence. Such oral evidence must consist not only a statement that the document was produced by a computer in the course of its ordinary use but also the matters presumed under s. 90A(4). On the other hand the presumption contained in s. 90A(6) can be resorted to only when the document was not produced by a computer in the course of its ordinary use.
>
> [34] In this case no certificate was tendered as required by s. 90A(2) for proof of the chemist report (P83). Neither was any oral evidence adduced to show that the report was produced by a computer in the course of its ordinary use. It therefore remains that the only evidence available is that the report was produced by a computer. It is thus appropriate to resort to s. 90A(6) to presume that the report was produced by the computer in the course of its ordinary use. …

[28] In the instant appeal PW16 had testified that exh. P71 was a document produced by a computer. In fact she and Inspector Salwani had keyed in the data into the computer. It is true that the prosecution had not tendered a certificate under s. 90A(2) of the Evidence Act and PW16 did not say whether exh. P71 was produced by a computer in the course of its ordinary use. However, by proving that exh. P71 was produced by a computer the prosecution, in view of the authorities cited earlier, could resort to the presumption under s. 90A(6) which provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use. We are of the view that exh. P71 was rightly admitted in evidence by the learned trial judge.

[29] As exh. P71 was an admissible evidence pursuant to s. 90A of the Evidence Act PW16 could therefore rely on it to compare and check whether the seized Singapore currency given by PW12 to her was a ransom money. There was therefore no necessity for PW16 to rely on exh. P12 (1-5) or for the prosecution to call PW8 and PW9 to identify the seized money as a ransom money. What was done by PW16 to identify the seized Singapore notes was sufficient for the prosecution to prove that the seized Singapore currency was ransom money. As such we found no merit in the appellant's argument on this point.

[30] With regard to the appellant's contention that there was a gap in the prosecution case as PW12 handed the money to PW16 five days after its seizure and there was no explanation by PW12 what happened to the money during that period we also found no merit in the argument. It is clear from PW12's evidence that he had handed the money seized from the appellant's house to PW16. PW12 could not hand over the seized items to PW16 earlier because PW16 was on leave. From PW12's evidence, a lot of money was recovered in the appellant's master bedroom. Altogether S$10,000 and RM101,500 seized from the appellant's master bedroom. PW12's evidence was supported by the search list, exh. P17, which was prepared by him on 9 May 2008 and the document was signed by the appellant. The relevant part of exh. P17 is as follows:

> 3. Dalam almari baju.
>
> – wang Singapore Dollar
>
> $50 = 100 keping.
>
> – wang Singapore Dollar
>
> $1000 = 5 keping.
>
> – wang Thailand Baht
>
> 500 = 1 keping.
>
> – wang Thailand Baht = 1 keping.

[31] Exhibit P19 is the Borang Penyerahan Barang Kes dated 14 May 2008. It was signed by PW12 and PW16. The relevant part of the exh. P19 is a follows:

> 3. Wang tunai Singapore Dollar 50 sebanyak 100 keping.
>
> 4. Wang tunai Singapore Dollar 1000 sebanyak 5 keping.

[32] The evidence showed that all the Singapore notes found in the appellant's master bedroom were handed over to PW16 by PW12. PW16 found that part of the Singapore notes were ransom money. There was therefore no gap in the prosecution's case with regard to Singapore notes seized from the appellant's house.

Prejudicial Evidence

[33] We now turn to the issue of the prejudicial evidence. Learned counsel for the appellant submitted that the learned trial judge's decision had been influenced by two pieces of prejudicial evidence given against the appellant. The first one is the evidence of PW12 which is a hearsay evidence where PW12, in examination-in-chief, testified as follows:

> Pada 9.5.2008 lebih kurang 1.30 tengah hari saya berada di sekitar kawasan pekan lama Petaling Jaya (PJ Old Town). Tujuan saya di sana atas arahan membuat follow-up satu kes culik. Pada masa itu saya dapat maklumat suspek yang terlibat dalam kes culik berada di deretan rumah kedai dan saya terus arahkan anggota ambush dan tangkap suspek.

[34] Learned counsel for the appellant submitted that the prosecution had not proved that the appellant was involved in the kidnapping of PW7. As such what was said by PW12 was a hearsay evidence. Further, there was no evidence to say what was the exact information received by PW12 and from whom he received the information.

[35] In *Subramaniam v. Public Prosecutor* [1956] 1 LNS 115 the Privy Council said:

> … Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before their Lordships statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been

A believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes.

[36] The second prejudicial evidence as contended by the appellant was the evidence of PW14, Chief Inspector Tan Woon Lee, who interviewed the appellant. PW14 testified as follows:

B

> Dalam temubual dengan OKT dia beritahu dia bersama satu lelaki Cina telah membakar seluruh kereta dalam kes culik. Saya bacakan kata-kata amaran di bawah Seksyen 15(c)(b) Akta Culik dalam Bahasa Malaysia.
>
> C
>
> Adakah kamu ingin bercakap apa-apa kamu tidak diwajibkan berkata apa-apa. Jika kamu berkata apa-apa ianya boleh digunakan di dalam perbicaraan Mahkamah.
>
> D Saya terangkan dalam Bahasa Mandarin kepada OKT. Dia faham katanya dalam Bahasa Mandarin. Saya hubungi pegawai penyiasat kes dan beritahu tentang hasil temubual tersebut.

[37] Learned counsel submitted that the statement made by the appellant to PW14 was a confession. As the learned trial judge E did not make a finding whether the statement had been given by the appellant voluntarily or not the statement was not admissible and could not be relied upon by the trial court.

[38] In his brief judgment, the learned trial judge, *inter alia*, said:

F

> OKT/Perayu telah ditangkap oleh Polis hasil dari maklumat yang diterima, 2 bulan selepas kejadian. Apabila OKT/Perayu dibawa ke rumah beliau pihak polis (SP12) telah menjumpai sejumlah wang tunai. Dari wang tunai tersebut, didapati 60 keping darinya adalah wang tunai Singapura. Apabila SP16 menyemak nombor siri 60
>
> G keping wang Singapura tersebut didapati ianya sama dengan nombor siri yang sama seperti P12.
>
> Dari search list P17 ada disenaraikan matawang Singapura yang dirampas dari bilik tidur OKT/Perayu.
>
> H Di dalam P17 nombor siri matawang Singapura tidak dicatitkan kerana mengikut SP12 matawang tersebut terlalu banyak, beliau hanya buat salinan fotostat sahaja.
>
> SP16, Pegawai Penyiasat menyatakan beliau menerima sejumlah wang tunai yang dirampas oleh SP12 di rumah OKT/perayu. Dari
>
> I wang tersebut didapati 60 keping matawang Singapura mempunyai

nombor siri yang sama dengan salinan fotostat P12 (1-5). Wang tunai Singapura tersebut juga dikemukakan sebagai eks. P20 hingga P67.

Hujah peguambela bahawa SP12 tidak mencatitkan nombor siri matawang Singapura yang dirampas dari rumah OKT/perayu telah diterangkan oleh SP12, iaitu terlalu banyak wang tunai yang dirampas di samping barang-barang kes yang lain. Perlu diingat SP12 tidak tahu wang tebusan telah dibuat salinan fotostat lebih awal.

Andaian undang-undang adalah jelas seperti yang dinyatakan di bawah Seksyen 5(2) Akta Culik 1961:

(2) For the purpose of subsection (1), a person found to be in possession, of any money or property or any proceeds thereof which has at any time been delivered as ransom shall, unless the contrary is proved, be deemed to have knowledge that such money or other property was delivered as such ransom.

Berdasarkan dari keterangan di atas dan kes Mahkamah Persekutuan *Pendakwa Raya v. Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457. Saya memutuskan atas maximum evaluation bahawa pihak pendakwaan gagal membuktikan kes *prima facie* di bawah s. 3 tetapi berjaya membuktikan kes *prima facie* di bawah s. 5 Akta Culik 1961, dengan itu OKT/perayu dipanggil untuk membela diri di bawah s. 5 tersebut.

[39] It is clear from the learned trial judge's judgment that he found a *prima facie* case under s. 5 of the Act at the close of the prosecution case solely on the ground that part of the Singapore currency found in the appellant's master bedroom was a ransom money. We cannot find anything in his judgment to suggest that he was influenced by the alleged prejudicial evidence as contended by learned counsel for the appellant when he ruled that a *prima facie* case under s. 5 of the Act had been proved against the appellant. The appellant's argument on this issue, in our view, was therefore without substance.

Non-Calling Of Chief Inspector Lim

[40] Under cross-examination PW8 said the photostated copies of the ransom money (ie, exh. P12 (1-5)) were given to Inspector Lim by PW9. PW8 did not keep a copy of the documents. In his evidence PW9 identified exh. P12 (1-5) as the documents

prepared by him. PW16, under cross-examination, said she was informed by Chief Inspector Lim that only 3/4 of the ransom money was photostated by the family of the victim.

[41] Learned counsel for the appellant submitted that Chief Inspector Lim is a material witness with regard to exh. P12 (1-5). It was Chief Inspector Lim who gave exh. P12 (1-5) to PW16. As such Chief Inspector Lim should be called by the prosecution to confirm that exh. P12 (1-5) was the documents he received from PW9 and then handed over to PW16. As Chief Inspector Lim was not called learned counsel submitted that an adverse inference under s. 114(g) of the Evidence Act 1950 should be made against the prosecution.

[42] In *Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 Mohamed Azmi SCJ opined:

> … It is essential to appreciate the scope of section 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[43] In the instant appeal PW9 was the maker of the documents exh. P12 (1-5). He gave evidence in court and he identified exh. P12 (1-5) as the documents prepared by him. There was therefore no necessity to call Chief Inspector Lim to give evidence relating to exh. P12 (1-5). PW16, the investigating officer, also identified exh. P12 (1-5) when she gave evidence in court. There was no suppression or withholding of evidence relating to exh. P12 (1-5). Again, we found no merit in the appellant's argument on this issue.

Failure To Explain The Offence At The Close Of The Prosecution Case And The Charge Is Defective

[44] In the notes of proceeding the following was recorded on 6 October 2009:

Keputusan di akhir kes pendakwaan.

Setelah mendengar dan membaca semula segala keterangan dan meneliti hujah-hujah kedua belah pihak, saya memutuskan bahawa Pendakwaan gagal membuktikan kes *prima facie* melampau tahap keraguan yang munasabah seperti pertuduhan. Walau bagaimanapun saya mendapati satu kes *prima facie* telah dibuktikan di bawah Seksyen 5, Akta Culik 1961. Tertuduh dipanggil untuk membela diri bawah Seksyen 5, Akta Culik 1961.

[45] Learned counsel for the appellant submitted that there are three distinct offences under s. 5 of the Act, namely receiving ransom money, possessing ransom money and disposing of ransom money. It was contended that when the learned trial judge ordered the appellant to enter his defence against an offence under s. 5 of the Act at the close of the case for the prosecution the learned trial judge did not explain or indicate to the appellant what was the specific offence the appellant had to answer. The appellant did not know exactly what was the charge he was called upon to answer. In support of that learned counsel for the appellant cited the cases of *Public Prosecutor v. Lee Pak* [1937] 1 LNS 48 and *Jagar Singh v. Public Prosecutor* [1936] 1 LNS 25.

[46] With respect we are unable to agree with the submission of learned counsel for the appellant. The amended charge had being read and explained to the appellant. It is clear that in the amended charge the appellant was alleged to have received the ransom money in the amount of S$7750.

[47] With regard to the amended charge, learned counsel for the appellant submitted that the amended charge as framed by the learned trial judge was defective and it was vague and had caused confusion to the defence. The defective charge had prejudiced the appellant. It was contended that the date, time and place of the offence as stated in the amended charge were wrong.

[48] Learned counsel for the appellant also submitted that in the amended charge the appellant was alleged to have committed the offence of receiving S$7,750 of ransom money. However there was no evidence to prove that the appellant had received the ransom money. As the appellant had been misled and prejudiced by the defective amended charge, the defect could not be cured under s. 156 or s. 422 of the Criminal Procedure Code.

[49] The amended charge states that the appellant, on 1 March 2008 at about 9.30pm at the parking lot of NZX Commercial Center, Jalan PJU 1A/41B, Kelana Jaya, with several other persons, in furtherance of a common intention, to get ransom money in the amount of RM6,000,000, did kidnap ("menahan") Seow Wei Sheng. It further alleges that the appellant had received S$7,750 of the ransom money and he had committed an offence under s. 5 of the Act, read together with s. 34 of the Penal Code.

[50] There are two parts in the amended charge. The first part is that the appellant was alleged to have committed the offence of kidnapping Seow Wei Sheng and the second part is that on the same date he was alleged to have received the ransom money ie, S$7,750. From the evidence adduced by the prosecution it had been proved that Seow Wei Sheng (PW7) had been kidnapped and a ransom money of about RM6,000,000 had been paid by PW8 to the kidnappers for the release of PW7. The prosecution, however, was unable to prove the identity of the persons involved in the kidnapping of PW7. It was not proved that the appellant was involved in the kidnapping. In view of that we are of the opinion that what was stated in the first part of the amended charge had not been proved against the appellant.

[51] It was also not proved that on the same date the appellant had received S$7,750 of the ransom money. What the prosecution had proved against the appellant was that on 9 May 2008 a lot of money was seized from the appellant's master bedroom. From the money seized there was an amount of S$10,000 and from that amount it was proved that S$7,750 was ransom money. As such, what the prosecution had proved against the appellant was that on 9 May 2008 the appellant had in his possession S$7,750 of ransom money. The date, time and place of the offence as stated in the amended charge were therefore wrong. Furthermore, from the evidence adduced the appellant should have been called to enter his defence on the offence of having in his possession S$7,750 of ransom money and not the offence of receiving the ransom money.

[52] Section 152(1) and s. 153(1) of the Criminal Procedure Code provide:

152(1) Every charge under this Code shall state the offence with which the accused is charged.

153(1) The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

[53] The time, place and the specific offence stated in the amended charge were clearly wrong and the amended charge as framed did not comply with the requirements of s. 152(1) and s. 153(1) of the Criminal Procedure Code. It is trite law that in a criminal trial the particulars stated in the charge must be clear so that sufficient notice is given to the accused of the matter with which he is charged so that he would be prepared to answer the charge in the best possible way. In *Public Prosecutor v. Raymond Chia Kim Chwee & Anor & Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 at p. 264 Hashim Yeop A. Sani SCJ had this to say:

> … The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied. The principle of justice was in fact emphasised by Hepworth J in *Public Prosecutor v. Teoh Choon Teck* at p. 35 where he said:
>
> If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may.

[54] With regard to time the Federal Court in *Law Kiat Lang v. Public Prosecutor* [1965] 1 LNS 81 held that a mistake as to the date in a charge could not be regarded as material as the date was not an essential part of the alleged offence.

[55] In the instant appeal, besides the date, the place and time, the precise offence mentioned in the amended charge was also wrong. Considering the fact that there are so many errors in the charge, we are of the view that the amended charge, as framed by the learned trial judge, was defective as it failed to state the material particulars.

[56] The next issue for determination is whether the defects in the charge could be cured under ss. 156 and 422 of the Criminal Procedure Code. Section 156 provides:

> 156. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

Section 422 of the Criminal Procedure Code provides:

> 422. Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code;
>
> (b) –
>
> (c) –
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[57] The errors in the charge would be material if the accused is misled by the errors. An appellate court should not reverse a decision of the trial judge on account of any error in the charge unless such error has occasioned a failure of justice.

[58] In the instant appeal the appellant was ordered to enter his defence on the offence of receiving the ransom money on 1 March 2008. As stated earlier, on the evidence adduced, the prosecution had failed to prove a *prima facie* case that the appellant had received the ransom money on 1 March 2008. This is the case where the appellant was ordered to enter his defence on an offence that had not been proved by the prosecution at the close of the prosecution case. Thus, a prejudice had been caused to the appellant. Therefore when the appellant was ordered to enter his defence he was misled by the several errors in the amended charge. Having regard to the unsatisfactory nature of the decision of the learned trial judge, we further hold that the errors in the

charge had occassioned a failure of justice. It is our judgment that the defects in the amended charge were not curable under s. 422 of the Criminal Procedure Code. On this ground alone we hold the appeal should be allowed.

Whether The Defence Had Raised Doubt In The Prosecution Case

[59] As stated earlier the appellant, in his defence, explained that the money ie, S$10,000 found in his master bedroom was obtained from a money changer by his wife, SD2. He denied that the money was part of the ransom money.

[60] SD2 corroborated the evidence of the appellant. She was the one who changed the money from Ringgit into the Singapore Dollar with a money changer at Sungai Wang Plaza, Kuala Lumpur in April 2008. She kept the money in the cupboard inside her master bedroom. She did not inform the appellant about the money.

[61] In his judgment, the learned trial judge had made a brief comment on the appellant's defence. The learned trial judge said:

> Pembelaan memanggil dua orang saksi; iaitu OKT/Perayu sendiri (SB1) dan isteri beliau (SB2). Pembelaan menyatakan bahawa wang tunai Singapura SD10,000 tersebut diperolehi dari 'money changer'.
>
> Saya setuju bahawa tugas pembelaan hanyalah untuk menimbulkan keraguan yang munasabah; tetapi bukan keraguan yang 'imaginary' atau 'fanciful'. Untuk itu saya telah meneliti semula keterangan pihak pendakwaan iaitu wang tersebut sebanyak 60 keping mempunyai nombor siri yang sama dengan wang tebusan iaitu 5 keping matawang SD1,000/- dan 55 keping matawang SD50/- berjumlah SD7,750/- dari jumlah SD10,000/- yang dijumpai di bilik tidur OKT/Perayu.
>
> Setelah mempertimbangkan secara keseluruhan, saya mendapati pembelaan gagal menimbulkan keraguan yang munasabah. Saya dapati OKT/Perayu bersalah dan disabitkan kesalahannya.

[62] It is not clear from the learned trial judge's judgment whether the appellant was convicted for the offence of receiving the ransom money or for having in his possession the ransom money. It is abhorrent to our sense of justice to convict an accused person without informing him the precise offence he has

A been convicted of. Having perused the learned trial judge's judgment we are unable to say whether the appellant had been convicted for the offence of receiving the ransom money or for the offence of having in his possession the ransom money. It is also not clear whether the learned trial judge had invoked the
B presumption under s. 5(2) of the Act against the appellant.

[63] From the learned trial judge's brief comment on the defence's case we are unable to say whether the learned trial judge had adequately evaluated the evidence adduced by the defence. The
C learned trial judge did not give reason as to why he rejected the evidence of the appellant and his wife that the Singapore currency was obtained from the money changer.

[64] It must be observed that the money was seized from the
D appellant's house about two months after the kidnapping of PW7. About RM6 million ransom money was paid to the kidnappers. RM101,500 and S$10,000 were seized from the appellant's master bedroom. It had not been proven that the money in the Malaysian currency was part of the ransom money. Out of S$10,000 seized
E in the appellant's master bedroom, only S$7,750 was found to be the ransom money. The question to be asked is whether the explanation that the Singapore currency was obtained by DW2 from the money changer is reasonable and probable? Has the defence raised doubt in the prosecution's case that the money was
F a ransom money?

[65] Since the learned trial judge did not adequately evaluate the appellant's defence we took the liberty to consider the appellant's defence in accordance with s. 182A of the Criminal Procedure Code. Having in our minds the guidelines given by Suffian J in *Mat*
G *v. Public Prosecutor* [1963] 1 LNS 82 we are of the considered view that the appellant's defence that the money was not a ransom money as the money was obtained from the money changer was not inherently improbable and unbelievable. In our view, the learned trail judge had erred in rejecting the appellant's defence.
H The appellant, in our view, had raised reasonable doubt in the prosecution's case that the money found in his master bedroom was a ransom money.

I

Conclusion

[66] For the reasons given, we are of the view that the conviction of the appellant was not safe and the decision therefore cannot be sustained. We therefore allowed the appellant's appeal and set aside his conviction and sentence.